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No 84-437

In The

Supreme Court of the United States

October Term, 1984

THE EVENING NEWS ASSOCIATION, PETE WALDMIER, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM,

Petitioners,

vs.

JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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QUESTION PRESENTED

Should This Court Grant Certiorari Upon Petitioners' Request Where Petitioners Failed To Present To The Trial Court And Now Fail To Present To This Court Any Basis For Granting Petitioners' Motion For Partial Summary Judgment In The Trial Court?

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OPINIONS AND ORDERS BELOW

Respondents accept Petitioners' statement of the applicable opinions and orders below and incorporate same by reference.

JURISDICTION

Respondents upon information and belief accept Petitioners' statement as to jurisdiction.

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

Respondents acknowledge that Petitioners claim interference with the First and Fourteenth amendments of the Constitution of the United States of America; respondents deny any such interference.

———o———

STATEMENT OF THE CASE

Petitioners' Petition for Writ of Certiorari represents the "last gasp" attempt by petitioners (hereinafter "defendants") to partially abolish the law of defamation, at least in the State of Michigan.

Pursuant to editorial decision-making, defendants published numerous calculated defamatory articles about respondents (hereinafter "plaintiffs"), falsely portraying, implying, and insinuating that plaintiffs were members of the so-called "Mafia" or other organized crime group.

As a part of this litigation, each plaintiff has submitted an affidavit under oath that he was not a member of the Mafia.

Defendants have acknowledged at their depositions in this case that they do not believe that plaintiffs were

members of the Mafia or otherwise involved in organized crime, notwithstanding their earlier articles to the contrary, thereby establishing "actual malice".

Plaintiffs' action for defamation (and other theories) was commenced on or about April 3, 1980.

Defendants' second motion for summary judgment, which forms the basis for this attempted appeal, was subsequently filed alleging that there was no genuine issue of material fact. This motion did not attach the requisite affidavit in support based upon personal knowledge. At oral argument on the motion, defendants cited only one case to the trial court, which did not support their position. The trial court denied the motion for summary judgment, finding a genuine issue of material fact.

In initiating its appeal, defendants asked the trial court to certify that there was a controlling question of law involved as to which there was a "substantial ground for difference of opinion" under Michigan law; the trial court declined to do so, as defendants had failed to establish that there existed *any* authority in support of defendants' position.

The Michigan Court of Appeals granted defendants leave for an interlocutory appeal, but after full briefing and oral argument, the Michigan Court of Appeals in an unanimous unpublished per curiam opinion affirmed the trial court.[1] Defendants' request for rehearing was denied.

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[1]A much more detailed account of the underlying facts material to this matter is contained in plaintiffs' Brief on Appeal in the Michigan Court of Appeals, which is reprinted in full in Appendix A *infra,* with minor typographical corrections.

Defendants' application for leave to appeal to the Michigan Supreme Court was denied, as that court was not persuaded that interlocutory review was necessary. Defendants' request for reconsideration was denied.

Defendants' present Petition for Writ of Certiorari should similarly be denied, for the reasons set forth below.

—o—

REASONS FOR DENYING THE WRIT

I. Defendants' Petition For Writ Of Certiorari Is Both Factually Erroneous And Misleading.

For purposes of correcting defendants' erroneous and misleading statements of fact in defendants' Petition for Writ of Certiorari, plaintiffs advise this Court that:

1. Plaintiffs, contrary to defendants' characterization in their "Statement of the Case", page 3, paragraph 1, sentence 1, are *not* the primary operators of Pine Knob. Many of the operations of Pine Knob have been conducted by the Nederlander theater organization since 1972, including the Pine Knob Music Theater itself. Further, *as previously reported by defendants' own newspaper,* plaintiffs have lost their interest in Pine Knob through involuntary bankruptcy proceedings.[2] Plaintiffs submit, and stand

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[2]*Detroit News,* February 23, 1984, page 3-A, column 4; defense counsel apparently do not subscribe to defendants' advertising claims that "If you read the *News* you know"; *see also In the Matter of Pine Knob Investment Company,* United States Bankruptcy Court, Eastern District of Michigan, Consolidated Case Nos. 80-00872-G; 80-00873-G; 80-00874-G; and 80-00875-G, including February 15, 1984, Amended Order Confirming Sale of Assets.

ready to prove at trial, that the loss of their ownership of and other beneficial interests in the operations of Pine Knob was proximately caused by defendants' false and defamatory publications regarding plaintiffs' business activities.

2. Plaintiffs, contrary to defendants' assertion in their "Statement of the Case", page 3, paragraph 2, sentence 1, have never had "public careers" and are not in fact public figures of any type; defendants have not asked the trial court to so hold and no court has in fact so held.

3. Plaintiffs, contrary to defendants' assertion in said sentence, have never been "charged with organized crime involvement" except by the *Detroit News,* its parent corporation (defendant Evening News Association), and other named defendants in this action.

4. Upon information and belief and contrary to the undocumented assertion contained in page 3, paragraph 3, sentence 1 of said "Statement", no print or electronic reports concerning plaintiffs appeared in the media prior to the commencement of defendants' calculated and unfounded smear campaign against plaintiffs.

5. Contrary to page 3, paragraph 4, sentence 4 of said "Statement", plaintiffs' initial Complaint in state court *attached as exhibits each of defendants' false and defamatory articles,* clearly notifying each defendant of the statements forming the basis for plaintiffs' defamation claims, consistent with Michigan defamation pleading requirements.[3]

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[3]*See, e.g., Wynn v. Cole,* 68 Mich App. 706; 243 N.W.2d 923 (1976); *De Guvera v. Sure Fit Products,* 14 Mich App. 201; 165 N.W. 2d 418 (1968) (in a declaration of libel plaintiff merely must set forth the contents of the alleged libel and where it was published).

6. Contrary to page 4, second full paragraph, sentence 2, of said "Statement", plaintiffs have never stated that "they did not base their libel claim on any false statement of fact"; to the contrary, plaintiffs submit that defendants' publications constitute one or more false statements of fact, creating a false and defamatory statement about and concerning plaintiffs through half-truths and calculated insinuations, implications, innuendos, portrayals, characterizations, and imputations. Defendants have reiterated this false characterization of plaintiffs' position in this litigation at various locations in their Petition;[4] of course—and despite defendants' best misleading efforts—repetition of a false statement by defendants, in this instance defendants' misstatement of plaintiffs' litigation posture, does not make the false statement true. Plaintiffs therefore respectfully ask this Court to disregard these false statements in its consideration of defendants' Petition.

7. Contrary to defendants' misleading statement in the second sentence of the first full paragraph on page 6 of said "Statement", the Michigan Court of Appeals did not hold that plaintiffs "had not and could not identify any statement of fact contained in the news reports which they claim is false" nor did that Court's decision state or imply that plaintiffs gave defendants "absolutely no notice of what they are called upon to defend in this action." Defendants' "Statement" is not only misleading but also improperly argumentative. Defendants' version somehow misconstrues the following plain language of the Michigan Court of Appeals, which stated in pertinent part:

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[4]*See, e.g.*, "Statement of the Case", page 5, first full paragraph, sentence 2.

> Insinuation, imputation or inference may be as defamatory as a direct, unveiled assertion.
>
> • • •
>
> Plaintiffs did not concede the truth of the alleged insinuation.[5]

Furthermore, the *unpublished* per curiam decision of the Michigan Court of Appeals did not discuss at all defendants' present "due process-notice" argument as it was not developed by defendants in that forum.

8. Defendants' characterization of the Michigan Supreme Court's action on defendants' application for leave to appeal to that forum is misleadingly incomplete. In the second paragraph, third sentence on page 6 of said "Statement", defendants' imply that the Michigan Supreme Court made a decision on the merits in this matter; that implication is inaccurate. As set forth in defendants' Appendix D to their Petition, the Michigan Supreme Court merely denied leave to appeal "because the Court is not persuaded that the question should *now* be reviewed by this court."[6]

Plaintiffs submit that these negligent and/or intentional misstatements, both erroneous and misleading, are sufficient grounds alone for this Court to exercise its discretion under its Rule 17 to deny this Petition, pursuant to the provisions of this Court's Rule 21.5.[7]

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[5]Petitioners' Appendix B, at 5a (citations omitted).

[6]Petitioners' Appendix D, at 10a (emphasis added).

[7]Rule 21.5 states in pertinent part: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." *Rules of the Supreme Court of the United States,* Rule 21.5 (1980) (as revised and amended).

II. Defendants' Petition For Writ Of Certiorari Is Without Merit.

Rule 17.1 of this Court's Rules states in pertinent part that:

> A review of writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following . . . indicate the character of reasons that will be considered.
>
> * * *
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.[8]

For the reasons set forth below, defendants' Petition is without merit, particularly in light of this Court's stated considerations.

A. The Michigan Supreme Court Has Not Decided Any Issue In This Case.

As stated above, the Michigan Supreme Court has not decided any issue in this case. The Michigan Supreme Court's only relevant action has been to deny defendants' Application for Leave to Appeal to that court due to defendants' failure to persuade that court that review by that court was necessary at that time.[9] Clearly, no deci-

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[8] *Id.* at Rule 17.

[9] *Id.* Reconsideration was also denied by the court, "because it does not appear that the order was entered erroneously." Petitioners' Appendix E, at 11a.

sion on the merits of defendants' claims—or lack thereof —was made by that court.

B. The Michigan Supreme Court Has Not Decided Any Federal Question In This Case, And Therefore, Has Not Decided Any Federal Question In Conflict With The Decision Of Any Other Court.

The Michigan Supreme Court has not decided any issue in this case. *A fortiori,* the Michigan Supreme Court has not decided any federal question in this case. *A fortiori,* the Michigan Supreme Court has not decided any federal question in this case in conflict with the decision of any other state court of last resort or of a federal court of appeals. Therefore, under Rule 17.1(b), certiorari is disfavored and should be denied.

C. The Decision Of The Michigan Court Of Appeals In This Case Was An Unpublished Per Curiam Decision Having No Precedential Effect.

The August 24, 1983, decision of the Michigan Court of Appeals in this matter was an *unpublished, per curiam decision.* In Michigan, unpublished decisions of the Michigan Court of Appeals have no precedential effect whatsoever.[10]

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[10]*W. E. Westfall, Inc. v. Michigan Bell Telephone Co.,* 129 Mich. App. 301, 303-304; 341 N.W. 2d 514 (1983) ("We remind members of the bench and bar that unpublished opinions of this Court are without precedential value."); *Moultrie v. DAIIE,* 123 Mich. App. 403, 407-408; 333 N.W. 2d 298 (1983); *Borgess Hospital v. Berrien County,* 114 Mich. App. 385, 386 n. 1; 319 N.W. 2d 354 (1982), *leave denied,* 417 Mich. 865 (1983).

D. The Decision Of The Michigan Court Of Appeals In This Case Was Correct, Proper, And Consistent With Earlier Decisions Of The Michigan And Federal Courts.

Unfortunately, defendants' Petition needlessly but apparently intentionally muddles critical concepts. Once those concepts are clarified and reference made to earlier decisions of the Michigan and federal courts, it is clear that the unpublished decision of the Michigan Court of Appeals in this case was correct, proper, and consistent.

1. The word "statement" means more than "word by word" or "sentence".

Defendants' Petition unnecessarily and inappropriately attempts to limit the word "statement" to mean "word by word" or "sentence".

This is not the common, or the legal, understanding of the word "statement", which is "communication creating an impression". Commonly accepted "statements" include "fashion statements", themes in musical compositions, summaries of financial data, and other impressions. The *Merriam-Webster Thesaurus* (1978) regards "statement" as synonomous with "expression", as does *Webster's Collegiate Thesaurus* (1976), which further relates "statement" to "outgiving", "presentation", and "presentment".

Further, legal definitions support a broader interpretation of "statement" than that ascribed to by defendants. FED. R. EVID. 801(a) specifically defines "statement" to include both oral and written assertions and "nonverbal conduct of a person"; FED. R. EVID. 801(a) does

not say "word by word" or "sentence".[11] Similarly, in *Turner v. Brien*,[12] the Iowa Supreme Court correctly noted that "it is the thought conveyed, not the words, that does the harm".

Clearly, "statement" means communication creating an impression, not "word by word" or "sentence". Defendants have had notice of each such statement since the day they were served with the initial Complaint in this matter, which attached as exhibits copies of each of the defamatory articles.[13]

2. Defendants needlessly muddle pretrial and trial standards when discussing plaintiffs' burden of proof.

Defendants further seek unnecessarily to confuse this Court by their implicit reliance on factually and procedurally distinct legal precedents, needlessly muddling *pretrial* and *trial* standards.[14]

Defendants, for example, have repeatedly relied upon *Postill v. Booth Newspapers*[15] and *Gaynes v. Allen*[16] as

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[11]See *also* MICH. R. EVID. 801(a) (identical to FED. R. EVID. 801(a)); *Black's Law Dictionary* 1263 (revised 5th ed. 1979) (*"In a general sense, an allegation . . . ."*). In this context, "allegation" is synonomous with "implication", "innuendo", "portrayal", and "insinuation".

[12]184 Iowa 320, 326; 167 N.W. 584, 586 (1918).

[13]See text accompanying n. 2 *supra*.

[14]This muddling takes place principally in Petitioners' Appendix H, which incorporates a substantial portion of defendants' earlier pleadings in the Michigan Supreme Court, and which implicitly is suggested to this Court as grounds for granting defendants' Petition.

[15]118 Mich. App. 608, 618; 325 N.W. 2d 511 (1982).

[16]128 Mich. App. 42; 128 N.W. 2d 42 (1983).

supportive of their quest for summary judgment. Defendants rely upon *Postill* for the proposition that "plaintiff still must prove falsity."[17] Defendants apparently read *Postill* to abolish Michigan General Court Rule 117.2(3)[18] in defamation cases involving the *Detroit News;* rather than ascertaining whether there exists a genuine issue of material fact precluding disfavored summary disposition, the *Detroit News* would have the trial court swear a jury and take "proofs" in a mini-trial upon their filing of a motion for summary judgment. Defendants apparently read the post-trial *Postill* decision to call for accelerated

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[17]Petitioners' Appendix H at 66a-67a generally; quotation at 67a, lines 2-3.

[18]Michigan General Court Rule 117.2(3) (cited in Michigan court pleadings as GCR 1963, 117.2(3)). Defendants' second motion for summary judgment in the trial court, dated March 12, 1982, was expressly based upon the provisions of Michigan General Court Rule 117.2(3), "that except as to the amount of damages there is no genuine issue as to any material fact, and the moving party is, therefore, entitled to judgment as a matter of law." *See by analogy* Fed. R. Civ. P. 56(c).

In support of their second Motion for Summary Judgment, defendants *argued* that there existed no genuine issue as to any material fact as plaintiffs had admitted the truth of each of the defamatory newspaper articles. As set forth at length above, this was a false assumption; plaintiffs indicated that the claims were not necessarily based upon a particular sentence, but that the entire series of articles falsely portrayed, insinuated, imputed and/or implied that plaintiffs were members of the Mafia. In further support of their response, plaintiffs each signed an affidavit indicating that they were *not* members of the Mafia. Defendants failed to comply with the requirements of Rule 117.3 by failing to attach an appropriate factual supporting affidavit with their second summary judgment motion; no affidavit based upon personal knowledge was ever submitted by defendants in support of their second motion for summary judgment. Under Michigan law, failure to file such an affidavit means the Motion for Summary Judgment must automatically be denied by the trial court. *See, e.g., DeMare Brothers Const. Co., Inc. v. Teska,* 49 Mich. App. 642; 212 N.W. 2d 602 (1973).

trials and proofs; such is not the case. The post-trial *Postill* decision obviously (1) did not address pre-trial summary judgment standards and (2) did not establish any mini-trial requirement. Plaintiffs will comply with the falsity requirement at trial; plaintiffs stand ready to prove liability and damages at trial, but are not required to do so under Michigan procedural law on defendants' motion for summary judgment, only that "a genuine issue of material fact" exists, which is the case unless defendants are now admitting the false and defamatory nature of their publications.

Similarly, defendants' reliance in this forum on post-trial cases such as *New York Times Co. v. Sullivan,*[19] *Gertz v. Robert Welch, Inc.,*[20] and *Curtis Publishing Co. v. Butts*[21] is misleading and regrettable. In each of those cases this Court considered a *post-trial* appeal from jury verdicts of $500,000, $50,000, and $960,000[22] respectively.

Plaintiffs will prove falsity at trial, before a jury of their peers. Plaintiffs are not constitutionally or otherwise required to "prove" falsity prior to trial, merely to state a claim and demonstrate that there exists a genuine issue of material fact, including as to the "falsity" requirement, which has been done.[23]

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[19]376 U.S. 254 (1964).

[20]418 U.S. 323 (1974).

[21]388 U.S. 130 (1967).

[22]This Court's *Curtis Publishing* decision considered two cases simultaneously, *Curtis Publishing Co. v. Butts* (with a verdict of $460,000) and *Associated Press v. Walker* (with a verdict of $500,000).

[23]Michigan General Court Rule 117.

3. Contrary to defendants' brash characterization of the impact of the Michigan Court of Appeals' unpublished decision in this case, this decision has had no known impact on free speech in Michigan or elsewhere.

As noted above, the decision of the Michigan Court of Appeals in this matter was an unpublished per curiam decision with no precedential effect.[24] Upon information and belief, the only generally published note regarding this Michigan Court of Appeals decision appeared in the *Detroit News* itself.[25] For defendants to attempt to bootstrap and/or manipulate the public's knowledge of this unpublished and non-precedential decision into some perceived "chilling effect" is preposterous, particularly when defendants seek to blame their own publications for creating this perceived "chilling effect".

Even more incredible is defendants' apparent argument that the Michigan Court of Appeals decision—wholly consistent with prior law (case law and statutory) in the states of Michigan,[26] Tennessee,[27] New York,[28] Iowa,[29] Lou-

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[24]See n. 9 *supra*.

[25]*Detroit News*, August 26, 1983, page 4-B, column 1 (including republication of defamatory material, thereby exacerbating plaintiffs' damages).

[26]Important Michigan statutory law includes Mich. Comp. Laws Annotated § 600.2911 (imputation of unchastity; imputation of a crime).

Important Michigan case law includes a 1983 decision against the *Detroit News*, *Lins v. Evening News Association*, 129 Mich. App. 419; 342 N.W. 2d 573 (1983), wherein the Michigan Court of Appeals stated:

(Continued on next page)

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> In his opinion, the trial judge concluded that, as a matter of law, *taking the column as a whole,* a legally actionable claim was asserted because it was susceptible of an interpretation which could harm the reputation of plaintiffs. Thus, he rejected defendants' claim that the article was not defamatory. We agree with the trial court. *Nuyen v. Slater,* 372 Mich. 654, 662; 127 N.W. 2d 369 (1964); *Iacco v. Bohannon,* 70 Mich. App. 463; 245 N.W. 2d 791 (1976), leave denied, 399 Mich. 846 (1977); 3 Restatement of Torts, § 559, p. 140. (emphasis added).

Plaintiffs herein also rely upon the following additional Michigan Supreme Court cases in general support of their three defamation counts: *Kenney v. Hatfield,* 351 Mich. 498, 512; 88 N.W. 2d 535 (1958) ("a publication imputing impairment of mental facilities is libel per se"); *Sanders v. Evening News Ass'n.,* 313 Mich. 334, 343; 21 N.W. 2d 152 (1946) (defendants' publication must be "fairly and reasonably construed"); *Hysko v. Polonia Publishing Co.,* 239 Mich. 676, 681; 215 N.W. 3 (1927) ("The words are to be taken in the sense in which they would be understood by those who read them."); *Moore v. Booth Publishing Co.,* 216 Mich. 653, 656, 185 N.W. 780 (1921); *Lonkhuyzen v. Daily News Co.,* 195 Mich. 283, 295; 161 N.W. 979 (1917); *Simons v. Burnham,* 102 Mich. 189, 195-97 (1894) ("leaving to the jury . . . the question of the meaning"); *Edwards v. Chandler,* 14 Mich. 471, 476; 90 Am. Dec. 249 (1866) ("[W]e are not prepared to say that a jury could not draw such an inference without reasonably stretching or perverting the sense. Such language must be construed by the jury, and not by the court.").

[27]*Memphis Publishing Co. v. Nichols,* 569 S.W. 2d 412, 419-420 (Tenn. 1978) ("Whether the news article . . . was . . . understood by readers in its defamatory sense is ultimately a question for the jury. * * * In our opinion, the defendant's reliance on the truth of the facts stated in the article in question is misplaced. The proper question is whether the *meaning* reasonably conveyed by the published words is defamatory.").

[28]*Fleckenstein v. Friedman,* 266 N.Y. 19, 23; 193 N.E. 537, 538 (1937) ("whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced").

[29]*Brown v. First National Bank,* 193 N.W. 2d 547, 553 (Iowa 1972) (truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true).

isiana,[30] Massachusetts,[31] California,[32] Alabama,[33] Delaware,[34] Florida,[35] and South Carolina[36]—had any chilling effect whatsoever on any person; defendants offer no support for such a preposterous contention.

4. The state court's decision in this case was consistent with Michigan law.

Michigan law favors decision-making by the trier of fact (judge or jury) at the time of trial; conversely, Mich-

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[30]*Schaefer v. Lynch*, 406 So. 2d 185, 188 (La. 1981) ("A defamatory meaning is insinuated. When truthful statements carry a defamatory innuendo, the implication should also be true to justify publication. [T]ruthful statements which carry a defamatory implication can be actionable.").

[31]*Mikhalik v. Duprey*, 417 N.W. 2d 1238, 1239 (Mass. App. 1981); *Tropeano v. Atlantic Monthly Co.*, 379 Mass. 745; 400 N.E. 2d 847 (1980).

[32]See, e.g., *Howard v. Southern California Ass'd Newspapers*, 95 Cal. App. 580; 213 P. 2d 399 (1950), *overruled in part on other grounds sub nom., Field Research Corp. v. Superior Court*, 77 Cal. Rptr. 243; 453 P. 2d 747 (1969) (scope of California punitive damages statutes); *Harris v. Curtis Publishing Co.*, 49 Cal. App. 2d 340; 121 P. 2d 761 (1942).

[33]*Marion v. Davis*, 217 Ala. 16, 18; 114 So. 357, 359 (1927) (words are equally actionable if the defamatory charge is made indirectly or by necessary inference, no matter how artfully disguised).

[34]*Rice v. Simmons*, 2 Harr. (Del.) 417, 433; 31 Am. Dec. 766 (1839) ("The character of a libel is to be judged by the effect it produces on the mind, . . . and . . . may depend much upon inferential reasoning.").

[35]*Caldwell v. Cromwell-Collier Publishing Co.*, 161 F. 2d 333, 335-36 (5th Cir.) (applying Florida law to a nationwide publication), *cert. denied*, 332 U.S. 766 (1947).

[36]*Duncan v. The Record Publishing Co.*, 145 S.C. 196; 143 S.E. 31 (1927) ("[I]t does not follow that such literal truth was a complete defense, as appellants contended. * * * [T]he publication, literally true as it was, was intended to convey and conveyed to readers thereof the defamatory meaning attributed thereto . . . .").

igan law generally disfavors summary dismissal of civil cases prior to trial.

This philosophy is embodied in part in Michigan General Court Rule 117.2(3), which precludes the granting of summary judgment as requested by defendants in the trial court unless procedurally defendants attach an appropriate factual supporting affidavit to their motion for summary judgment[37] and unless substantively defendants demonstrate that (1) there exists no genuine issue of material fact and (2) defendants are therefore entitled to judgment as a matter of law.[38]

In this case, defendants failed to meet all three procedural and substantive requirements. In fact, defendants failed to meet even one of these requirements.

Defendants did not submit the required affidavit. Defendants did not demonstrate that the jury could not as a matter of law determine that the portrayals, implications, imputations, and insinuations plainly generated by defendants' articles were both defamatory and false, particularly in light of plaintiffs' own factual affidavits that they were not members of the Mafia.

Summary judgment was therefore properly denied by the trial court.

For the same reasons, the Michigan Court of Appeals properly affirmed the trial court's denial of summary judgment.

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[37]MICH. GEN. CT. RULE 117.3.

[38]MICH. GEN. CT. RULE 117.2(3).

Clearly, from plaintiffs' attachment of each defamatory article to plaintiffs' Complaint and from plaintiffs' answers to defendants' fourth set of interrogatories to plaintiffs,[39] as well as from plaintiffs' five previous ap-

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[39]Answering defendants' Fourth Set of Interrogatories, plaintiffs stated on February 24, 1984, in pertinent part that:

> In regard to Interrogatory 1(a), plaintiffs, JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that the *defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article,* but, rather, that *the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation, and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the "Mafia";* individuals of low moral and character; that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.
>
> * * *
>
> As the article or articles, and the information contained therein, forms the basis for plaintiffs' libel allegations, the defamatory impact of the same cannot be dissected and articulated into solitary phrases or sentences. Rather, *the full portrayal, implication, imputation and/or insinuation can only be ascertained by viewing the articles, as they are presently known to plaintiffs, in conjunction with each other. Viewing the articles in the aforesaid fashion, the defamatory nature of the same becomes self-evident.* (emphasis added).

If this Court has not already done so, and if this Court retains any question about the defamatory nature of these articles, the Court is directed to review the actual articles published by defendants.

pellate briefs in the courts below,[40] defendants have had adequate and repeated notice, dating to April 3, 1981, that plaintiffs intended to hold defendants accountable for their defamatory and false portrayals, insinuations, imputations, and implications of and regarding plaintiffs. There should be no surprise, no ignorance as to these allegations; each has been clearly submitted to defendants through their counsel. For defendants to now claim some lack of requisite notice of plaintiffs' claims is ridiculous; defendants' "high-brow" Fourteenth Amendment argument is not on point and fails to cite any case which accurately supports its position.

Furthermore, by implication, defendants seek to invalidate the very procedural rule they sought to invoke in their motion for summary judgment, Michigan General Court Rule 117.2(3); having failed to rewrite established, proper, and constitutional Michigan and recognized nationwide common law with their motion, defendants now seek to carve out some defamation exception to the Michigan procedural rule (which is virtually identical to the operative language approved by this Court in Federal Rule of Civil Procedure 56(c)) they earlier sought to employ. No grounds whatsoever, except ungracious recognition of the fact that defendants will be judged by a

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[40]Plaintiffs' July 2, 1982, Response in Opposition to Defendants' Application for Leave to Appeal (Michigan Court of Appeals); plaintiffs' January 26, 1983, Brief on Appeal (Michigan Court of Appeals); plaintiffs' September 12, 1983, Response in Opposition to Defendants' Motion for Rehearing (Michigan Court of Appeals); plaintiffs' December 12, 1983, Response in Opposition to Defendants' Application for Leave to Appeal (Michigan Supreme Court); and plaintiffs' May 23, 1984, Response in Opposition to Defendants' Vexatious Motion for Reconsideration (Michigan Supreme Court).

jury of their peers for their unexcusable defamatory statements, has been set forth for action by this Court. This Court must not condone this type of unsupported—and unsupportable—attempt to rewrite both established defamation law and recognized and fair procedural devices to resolve factual disputes.

For these reasons, defendants' Petition must be denied.

5. The state court's decision in this case was consistent with earlier decisions of the federal court of appeals.

While this Court's Rule 17.1(b) indicates that a decision in conflict with the decision of a federal court of appeals may present grounds for granting a writ of certiorari, it is clear that applicable federal court of appeals decisions actually support the treatment provided this matter by the Wayne County Circuit Court and the Michigan Court of Appeals.

Initially, plaintiffs note that defendants rely upon but one case from a federal court of appeals, *Wilson v. Scripps-Howard Broadcasting Co.*[41] Defendants, however, again misleadingly rely upon *Wilson* for overbroad application. A fair—and correct—reading of *Wilson* reveals that *Wilson* is yet another post-verdict (not summary judgment) case, and therefore has very limited application to this case. *Wilson* stands for the proposition, after *Gertz v. Robert Welch, Inc.*,[42] that the First Amend-

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[41]642 F. 2d 371 (6th Cir.), *cert. granted,* 454 U.S. 962 (1981) (settled prior to oral argument).

[42]418 U.S. 323 (1974) *(Gertz I).*

ment requires the plaintiff in a libel case to prove fault (fault may not be presumed), and as a consequence, plaintiff has the burden of proof to prove falsity as well as defamatory content. Plaintiffs herein accept that burden and anticipate imposing liability based upon fault at trial in this case. Accordingly, the trial court's decision is completely consistent with *Wilson*.[43]

Plaintiffs rely further upon *Caldwell v. Crowell-Collier Publishing Co.*[44] in support of the trial court's disposition of defendants' second motion for summary judgment. In *Caldwell,* the Fifth Circuit reversed the trial court's dismissal of plaintiff's suit based upon failure to state a claim, stating in pertinent part that:

> A libel is a compound of written falsity and malicious publication, but *the falsity may consist in untrue imputation as well as a direct statement,* and malice may be inferred from the nature of the charges made. *False imputations may be actionable per se,* that is in themselves, *or per quod,* that is on allegation and proof of special damages.
>
> • • •
>
> It is not necessary that the false charges be made in a direct manner, if the words in their ordinary meaning convey it, and *an insinuation is as actionable as a positive assertion* if the meaning is plain.[45]

Once again, *Caldwell* supports lower court treatment of this matter.

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[43]Plaintiffs do not speculate as to the meaning, if any, to be ascribed to this Court's decision to grant certiorari in *Wilson, supra* at n. 41.

[44]See n. 35 *supra.*

[45]*Id.* (emphasis added).

Thus, defendants fail to demonstrate any conflict with the decision of any federal court of appeals; to the contrary, both the Fifth and Sixth circuits have treated federal defamation actions in the same or similar fashion as this defamation action has been treated by the Michigan courts.

Accordingly, no ground for certiorari exists under this Court's Rule 17.1(b), and defendants' Petition must be denied.

6. The state court's decision in this case is consistent with earlier decisions of this Court.

Contrary to defendants' assertions, the lower court treatment of this matter has been completely consistent with earlier decisions of this Court.

As noted above, defendants' excessive reliance on post-trial cases such as *Postill, Gaynes, New York Times, Gertz,* and *Curtis Publishing*[46] is regrettable. Further, defendants' inappropriate and overnarrow interpretation of "statement", overlooking defendants' clear message that plaintiffs were members of the Mafia, makes defendants' cited *Garrison v. Louisiana,*[47] *State v. Burnham,*[48] and *Letter Carriers v. Austin*[49] cases similarly inappropriate. None of these cases are inconsistent with this case.

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[46]See nn. 14-23 & accompanying text *supra.*

[47]379 U.S. 64 (1964).

[48]9 N.H. 34 (1837).

[49]418 U.S. 264 (1974).

Similarly, defendants' self-impressive due process argument conveniently ignores the notice repeatedly given by plaintiffs and received by defendants regarding plaintiffs' defamation allegations against defendants.[50] Defendants have been and are clearly on notice that plaintiffs intend to prove at trial that defendants published to third persons unprivileged defamatory and false statements of and concerning plaintiffs (or if subsequently found to be privileged, that same were published with "actual malice").[51] Accordingly, defendants' due process authorities, including *NAACP v. Burton*,[52] *Gooding v. Wilson*,[53] and *Winters v. New York*[54] are clearly inapplicable, nothwithstanding the requisite fact of absence of any alleged unconstitutional statute.

On the contrary, the handling of this matter by the Michigan courts to date is consistent with federal authorities including *Gertz;* even at this pretrial stage, it is clear that no liability will be imposed on defendants absent proof of fault at trial.

Thus, in this case, no state court has decided a federal question in conflict with any applicable decision of this Court; certiorari is therefore disfavored under this Court's Rule 17.1(c) and should be denied.

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[50]See nn. 39-40 and accompanying text *supra*.

[51]*See, e.g., Sanders v. Evening News Ass'n.*, 313 Mich. 334, 340; 21 N.W. 2d 152 (1946); *Jones v. Schaeffer*, 122 Mich. App. 301, 304; 332 N.W. 2d 423 (1982).

[52]371 U.S. 415 (1963).

[53]405 U.S. 518 (1971).

[54]333 U.S. 507 (1948).

7. This case presents no unsettled important question of federal law which has not been, but should be, settled by this Court.

As noted above, the Michigan courts below properly handled defendants' second motion for summary judgment, consistent with Michigan procedural and substantive law, consistent with common law in at least 10 other states, consistent with an earlier decision of the Fifth Circuit Court of Appeals, consistent with this Court's earlier decision in *Gertz,* and not inconsistent with any decision of the Sixth Circuit, any other circuit, or this Court.

Particularly in this pretrial posture and particularly in light of defendants' inability to cite any case or other authority in actual support of their position—either in the trial court on April 2, 1982, or in this Court today, there exists no reason whatsoever for this Court to now consider a heretofore settled question of federal law.

Accordingly, certiorari is disfavored under this Court's Rule 17.1(c) and should be denied.

———o———

CONCLUSION

Defendants' Petition for Writ of Certiorari sets forth (and there exists) no basis for this Court to grant certiorari in this matter, including but not limited to pursuant to this Court's Rule 17.1(b) and/or 17.1(c).

Furthermore, defendants' Petition is materially erroneous and misleading and should be denied pursuant to this Court's Rules 17 and 21.5.

For these reasons, plaintiffs respectfully pray and ask that defendants' Petition for Writ of Certiorari to the Supreme Court for the State of Michigan be denied.

Respectfully submitted,

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DATED: October 17, 1984

APPENDIX A

STATE OF MICHIGAN
IN THE COURT OF APPEALS

Court of Appeals
No.: 64729

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,

Plaintiffs-Appellees,

v

THE EVENING NEWS ASSOCIATION, INC., a Michigan Corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY, and JIM GRAHAM, jointly and severally,

Defendants-Appellants.

Wayne County Circuit Court
No.: 80-012145 CZ

PLAINTIFFS' BRIEF ON APPEAL

AFFIDAVIT OF COUNSEL

AFFIDAVIT OF SERVICE

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I

WHETHER DEFENDANTS, AFTER WAIVING ALL RIGHTS TO REHEARING AND/OR APPEAL, MAY ARGUE THAT "PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION FOR LIBEL"?

The trial court did not consider whether defendants waived their right to appeal the 1981 denial of defendants' motion for summary judgment pursuant to GCR 1963, 117.2(1).

Plaintiffs answer "No".

II

WHETHER THE TRIAL COURT PROPERLY DENIED A SUMMARY JUDGMENT MOTION BROUGHT PURPORTEDLY PURSUANT TO GCR 1963, 117.2(3), WHEN THAT MOTION WAS NOT SUPPORTED BY A PROPER AFFIDAVIT?

The trial court did not need to reach this question but reached the right result for another reason.
Plaintiffs answer "Yes".

III

WHETHER PLAINTIFFS' AFFIDAVITS, PLEADINGS AND OTHER MATERIALS SUPPORTED THE TRIAL COURT'S FINDING, PARTICULARLY WHERE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO GCR 1963, 117.2(3), WAS UNSUPPORTED BY A PROPER AFFIDAVIT?

The trial court answered "Yes".
Plaintiffs answer "Yes".

COUNTER-STATEMENT OF FACTS

Due to defendants' continued and blatant disregard for the truth, including at a minimum the publications

which form the basis of this litigation and the purported "Statement of Facts" contained in defendants' Appellants' Brief on Appeal, plaintiffs submit the following Counter-Statement of Facts:

Pursuant to editorial decision-making, numerous defamatory articles regarding plaintiffs were published by The Detroit News, written by various Detroit News reporters, columnists, editors, and staff writers. Among these writers were Michael F. Wendland and Genevieve Gadomski. Despite repeated imputations, insinuations, implications, and portrayals by The Detroit News that plaintiffs were members of the so-called "Mafia" or some other organized crime groups—including articles to that effect by defendants Wendland and Gadomski—defendants Wendland and Gadomski have testified that they never substantiated their published imputations, insinuations, implications, and portrayals. Plaintiffs have alleged and will prove that these published imputations, insinuations, implications and portrayals are, in fact, false.

Highlighting the fact that defendants knowingly published articles capable of defamatory interpretation is defendant Wendland's own deposition testimony:

Q. (by plaintiffs' counsel)
In January or February of 1979 you again were asked to do some investigation into Pine Knob, correct?

A. (Mr. Wendland)
That is correct.

Q. And from whom, if anyone, did you get that assignment?

A. That assignment came specifically from Bill Lutz.

Q. Do you know how or why that assignment again was generated?

A. I think that it was, as I recall, I sat down in his office and we discussed a number of projects that I would be working on and at that time he felt that I should concentrate my efforts into the Pine Knob story.

Q. Did he tell you why

A. Well, Pine Knob, as I recall, he had heard these rumors, and Pine Knob is certainly now and was then the premier entertainment complex in this area. It was a fascinating story and those rumors were widespread enough that he felt it was in our interest, the newspaper's interest, to look into it. That's what our job is.

Q. When you say it was in the newspaper's interest to look into it, what do you mean by that?

A. It's the newspaper's job to report the news and the Pine Knob stories and those rumors were certainly news. There is a little sign up on the top of the Detroit News Building with engraved stone that kind of says, I guess, what the newspaper is supposed to do and one of the things is the mirror of the public eye.

Q. Well, what about rumors makes it news?

A. Well, when rumors are widespread, as they certainly were in this case, a newspaper's job and role in the community is to try and sort out the rumors from the truth.

* * *

Q. Mr. Wendland, did you ever get—strike that.

Were you ever able to separate the rumor from the truth about organized crime involvement in Pine Knob, to your satisfaction?

A. Yeah, to my satisfaction I believe so.

Q. And what was that separation?

A. I don't believe there is any organized crime involvement in the ownership of Pine Knob.

Q. Was that your feeling before these articles appeared, sir?

A. I had no feeling. I didn't know.

Q. *After you began your investigation and at the completion of your investigation but while you were writing the articles, was that your feeling, that there was no organized crime involvement in Pine Knob?*

A. *Yes.*

Q. That's what your investigation had shown to your satisfaction at least?

A. Yes. I was satisfied that I could not say that Pine Knob was an organized crime business. It was not provable that I could find. I don't believe that there was any.

(Wendland deposition, p. 15, line 6—p. 16, line 22; p. 47, line 23—p. 48, line 18) (emphasis added). Ms. Gadomski's deposition is equally illustrative:

Q. (by plaintiffs' counsel)

Were you aware prior to beginning your investigation that led into these stories that you were looking into rumors that there was organized crime involved with Pine Knob?

A. (Ms. Gadomski)
Yes.

Q. Who made you aware of that?

A. I don't know. They were floating around.

Q. I asked you, though, whether you were told prior to beginning your research that you were looking into rumors specifically that organized crime was involved in Pine Knob?

A. Yes.

Q. And who informed you of that?

A. Bill Lutz.

Q. Do you feel that your research and investigation that you performed in relation to this Pine Knob Story substantiated that there is organized crime involvement at Pine Knob?

A. No.

* * *

Q. But if I understand your testimony correctly, you indicated that your research and investigation did not show that there was any organized crime involvement at Pine Knob?

A. We couldn't substantiate it.

Q. Did you report your findings to anyone at the Detroit News?

A. Not to any individual, no.

(Gadomski deposition, p. 29, line 14—p. 30, line 4; p. 30, lines 14-19).

Notwithstanding the fact that defendants' own investigation disclosed that Pine Knob was *not* "an organized crime business" and found no substantiation for the belief that Pine Knob had organized crime involvement, defendants went ahead with their series of articles on Pine Knob linking plaintiffs with the murder of Harvey Leach, head of the Joshua Doore furniture store chain, and a second murder, as well as assorted other organized crime and "Mafia" figures.

Accordingly, after a due demand for retraction was made pursuant to MCLA 600.2911; MSA 27A.2911 and rejected, plaintiffs instituted this litigation on or about

April 3, 1980, alleging, among other things, that these articles were libelous.

On or about April 30, 1981, defendants filed an initial motion for summary judgment, pursuant to GCR 1963, 117.2(1), claiming in part that the libel allegations contained in plaintiffs' Complaint failed to state a claim upon which relief could be granted, allegedly because defendants failed to specify the alleged libelous statements.

The circuit court denied defendants' motion for summary judgment on plaintiffs' libel counts on the basis that the requirement that the content of the allegedly libelous information be set forth in the Complaint was satisfied by plaintiffs' attachment of the subject articles to their Complaint (an amended complaint was filed on or about March 17, 1982; the libel allegations in both the original and amended complaint are identical; the same articles were also attached to the amended complaint). No motion for rehearing, much less an application for leave to appeal to this Court, was ever filed by defendants regarding the trial court's denial of defendant's GCR 1963, 117.2(1), motion for summary judgment.

After defendants filed their initial motion for summary judgment, defendants submitted three sets of interrogatories on or about August 8, 1981, August 24, 1981, and September 4, 1981, regarding three of the subject Detroit News articles. Defendants submitted an identical interrogatory, containing six subparts, on each of the 258 sentences contained in these three articles. The circuit court, recognizing that defendants had, in essence, submitted 1,548 interrogatories in less than a month, upheld plaintiffs' objections to these interrogatories. However,

the circuit court suggested that defendants redesign their interrogatories to relate to the articles as a whole:

> Well, why don't you ask them on the article as a whole? . . . If you want to revise your interrogatories to ask them the same question dealing with the articles as a whole, fine, I will order them to answer it . . . so I would be perfectly happy to make them answer it as a whole.

(Hearing transcripts, pps. 6-7).

Defendants later filed a fourth set of interrogatories which plaintiffs subsequently answered. Plaintiffs' answers to defendants' fourth set of interrogatories reflected that plaintiffs' claims *were not necessarily* based on a particular false statement but that *the entire series of articles falsely portrayed, insinuated, imputed and/or implied that plaintiffs, among other things, were members and/or associates of an organized criminal society otherwise known as the "Mafia".*

After receiving these answers to interrogatories, and after apparently misreading the clear language of these answers, defendants once again moved for summary judgment, this time pursuant to GCR 1963, 117.2(3) (no genuine issue as to any material fact), but without a proper supporting affidavit, as noted in plaintiffs' Brief in Response to Defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claims, at p. 2-3. Defendants apparently proceeded on the theory that plaintiffs were required to establish that *a particular sentence* in a particular article was "factually false".

The circuit court denied defendants' second motion for summary judgment on the basis that the "factual falsity" requirement was not limited to direct statements

but that it also pertains to implications, imputations and insinuations, the trial court's denial of this second motion was caused, at least in part, by defendants' inability to cite *one* case in support of defendants' position.

Following defendants' reliance at oral argument on the case of *Schultz v. Reader's Digest Ass'n*, 468 F Supp 551 (ED Mich 19), the trial court stated:

> THE COURT: I read the case. Don't bother going into it. I just read it.
>
> * * *
>
> THE COURT: I don't think the Hoffa case [*Schultz*] is on point at all, because in the Hoffa case the judge was making a ruling as a matter of law that plaintiff would not be able to show actual knowledge for reckless disregard. This issue is not before this court.
>
> * * *
>
> THE COURT: In the Schultz case I think there is definitely language that goes against your case. On page five fifty-four the court goes into a long discussion of if words are susceptible of different interpretations it's for the jury to say whether or not they were defamatory. There's a whole long discussion about this.
>
> * * *
>
> THE COURT: The tenor of the articles could be interpreted as false. Implying that this is a Mafia member. Implying that they are criminals. The whole tenor of it. I think that is what we have been talking about with all these motions. The tenor of the articles.
>
> * * *

MR. STEWART (defendants' counsel):

> I will say to you today, for the purpose of this argument I agree. For the purpose of this argument it's capable of defamatory interpretation. Let's assume we all agree.

(April 2, 1982, hearing transcript, p. 4, lines 24-25; p. 5, lines 12-16; p. 6, lines 9-14; p. 8, lines 18-22; p. 15, lines 13-16).

Defendants failed to cite any case other than the *Schultz* case to the trial court on oral argument of their second motion for summary judgment (pursuant to GCR 1963, 117.2(3)). At no time has the trial court found that plaintiffs are public officials or public figures or that defendants' unsubstantiated implications concerned a matter of public interest. The circuit court entered its Order denying defendants' motion on April 6, 1982.

After defendants indicated an intent to appeal, the trial court refused to certify defendants' proposed controlling question, as defendants had failed to establish that there existed *any* authority in support of their position, and therefore, there was no indication that there existed *any* ground for difference of opinion, pursuant to GCR 1963, 806.3(1) (a) (ii) (certification of controlling questions of law "as to which there is substantial ground for difference of opinion").

Defendants thereafter filed an Application for Leave to Appeal to this Court, which was opposed by plaintiffs but granted by this Court on August 3, 1982.

Plaintiffs specifically deny several of the most outrageous falsehoods contained in defendants' purported "Statement of Facts" in defendants' Appellants' Brief on

Appeal. First, defendants falsely state that plaintiffs each have a "conviction for loan fraud"; neither plaintiff has ever been convicted of loan fraud. Second, contrary to what defendants know to be the truth, plaintiffs have never "admitted that the articles contain no false statements of fact"; such misrepresentation merely highlights defendants' utter disrespect for both the truth and this Court, and clearly overlooks the plain, simple and clear language of plaintiffs' answers to interrogatories, wherein plaintiffs' stated in part that "the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation. . . ." Third, defendants again blatantly misrepresent the truth by stating that, "[i]n opposing this motion, appellees again admitted that each and every statement contained in the news reports was true. . . ." Plaintiffs respectfully suggest that any reliance which might be placed by this Court on defendants' purported "Statements of Facts" be undertaken only after careful and detailed scrutiny and with caution.

———o———

ARGUMENT

I. DEFENDANTS, AFTER FAILING TO SEEK TIMELY REHEARING OR APPEAL, ARE NOW PRECLUDED FROM RAISING ON INTERLOCUTORY APPEAL AN ALLEGATION THAT "PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION FOR LIBEL".

Defendants' initial motion for summary judgment pursuant to GCR 1963, 117.2(1), was filed on or about April

30, 1981. Under GCR 1963, 117.2(1), defendants in this case argued that plaintiffs had "failed to state a claim upon which relief can be granted". This question—whether plaintiffs had failed to state a claim—was argued before the trial court and denied by the trial court. An order specifically denying summary judgment pursuant to GCR 1963, 117.2(1), was entered by the trial court during 1981. No motion for rehearing, pursuant to Wayne County Circuit Court Rule 119.8 or otherwise, was ever filed. No interlocutory appeal of the denial of defendants motion pursuant to GCR 1963, 117.2(1), was ever sought, much less granted. Nowhere in defendants' June 1, 1982, Application for Leave to Appeal to this Court (granted August 3, 1982) do defendants assert or allege any basis for appeal grounded on GCR 1963, 117.2(1).

As this Court has stated time and again, this Court will not consider those issues [not] properly before it, including those issues not preserved for appeal. *See, e.g., Dale v. Whiteman,* 388 Mich 698; 202 NW2d 797 (1972). Plaintiffs respectfully submit that defendants' belated attempt to resurrect defendants' arguments that plaintiffs have failed to state a cause of action for libel were not preserved for appeal due to defendants' previous acquiescence in the trial court's denial of defendants' initial motion for summary judgment and defendants' failure to assert that non-issue as a ground for appeal at the present time.

Even at this belated date, defendants apparently fail to note the clear language of plaintiffs' May 12, 1982, Second Amended Complaint, which states at Count I:

(1) "[D]efendants falsely, wickedly and maliciously said of and/or insinuated that plaintiffs . . .

were persons engaged in organized crime. . . ." (paragraph 2); and

(2) "[S]aid publications were false and/or created false implications. . . ." (paragraph 3).

Thus, plaintiffs' Second Amended Complaint clearly pleads false publications and states a claim against defendants. While plaintiffs respectfully submit that defendants' belated attempts to resurrect pleading arguments is wholly improper and untimely, plaintiffs in the alternative respectfully submit that said arguments are entirely moot.

II. DEFENDANTS FAILED TO COMPLY WITH THE REQUIREMENTS OF GCR 1963, 117.2(3), WHEN PRESENTING THEIR SECOND MOTION FOR SUMMARY JUDGMENT, AND THEREFORE, THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION.

Defendants' second motion for summary judgment, dated March 12, 1982, is expressly brought based upon the provisions of GCR 1963, 117.2(3), "that except as to the amount of damages there is no genuine issue as to any material fact, and the moving party is, therefore, entitled to judgment as a matter of law".

Defendants, however, overlooked the crystal clear mandatory language of GCR 1963, 117.3, which states in part:

> A motion based upon sub-rule 117.2(3) *shall* be supported by affidavits, and the opposing party prior to the day of hearing may serve opposing affidavits. The affidavits submitted by either party shall be governed by the provisions of sub-rule 116.4, 116.5, and 116.6. (emphasis added).

These sub-rules, and GCR 1963, 116.4, in particular, state in part:

> Supporting and opposing affidavits shall be made on personal knowledge and shall set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the pleading or motion. Such affidavits shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts contained therein.

Contrary to these unambiguous rules, defendants failed to submit a proper affidavit in support of their second motion for summary judgment. The sole affidavit attached to defendants' second motion for summary judgment (other than the Proof of Service) stated only:

> "James E. Stewart, being first duly sworn, states as follows:
>
> 1. That he is a partner in the firm of Butzel Long Gust Klein & Van Zile, attorneys for all defendants except Gene Grudi in the above case;
>
> 2. That he has read the within Motion for Summary Judgment as to Plaintiffs' Libel Claims, and the contents are true and accurate *to the best of his knowledge and belief, except as to those matters therein stated to be upon information and belief, and as to those matters, he believes them to be true.*" (emphasis added).

Plaintiffs respectfully submit that Mr. Stewart's affidavit failed to comply with the clear requirements of GCR 1963, 116.4, 117.2(3) and 117.3. Further, this defect was succinctly raised in the trial court in plaintiffs' Brief in Response to Defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claims, at pp 2-3. The importance of a meaningful affidavit has been repeatedly recognized in the context of motions for summary judgment pursuant

to sub-rule 117.2(3). *See, e.g.,* 1 Honigman & Hawkins, 1982 Supp, p 145 ("The supporting affidavit, which *must* be filed with such a motion, identifies those facts which may appear to be controverted in the peadings but which, the mover asserts, cannot be genuinely disputed.") (emphasis added); *Hayes v. Booth Newspapers, Inc,* 97 Mich App 758, 295 NW2d 858 (1980) (granting sub-rule 117.2(3) motion without proper supporting affivadit will result in *per se* reversal); *DeMare Bros Constr Co Inc v Teska,* 49 Mich App 642, 212 NW2d 602 (1973) (same). *See also,* 1 Honigman & Hawkins, 1982 Supp, p 147 (affivadits by attorney for movant based upon "best of information and belief" do not conform with sub-rule 117.3 and 116.4); *Peck v Auto Owners Ins Co,* 112 Mich App 329; 315 NW 2d 586 (1982) (same).

Therefore, under the clear mandatory language of the General Court Rules, as interpreted by this Court in both *Hayes* and *DeMare Bros. Constr. Co., Inc., supra,* defendants failed to comply with the requirements of GCR 1963, 117.2(3), when presenting their second motion for summary judgment, and therefore, the trial court properly denied defendants' motion on this ground alone.

III. THE TRIAL COURT'S FINDING WAS SUPPORTED BY THE RECORD BEFORE IT.

In *Peisner v. Detroit Free Press,* 82 Mich App 153, 164, 226 NW2d 693 (1978) (Peisner II), this Court set forth the factors to be considered by a trial court when considering a motion for summary judgment pursuant to GCR 1963, 117.2(3):

> Motions for summary judgment under GCR 1963, 117.2 (3) are not proper unless no genuine issue as to any

material fact remains. In passing on the motion, *benefit of every reasonable doubt must be given to the party opposing the motion.* Summary Judgment under this provision is designed to test whether factual support exists for the claim made. Affidavits, pleadings, depositions, admissions, and other documentary evidence must be considered by the court. *Courts are liberal in finding that a genuine issue does exist, in order not to infringe upon a party's right to trial of disputed factual issues. Rizzo v. Kretschmer,* 389 Mich 363, 370-374; 207 NW2d 316 (1973); *Wynglass v. Prudential Life Ins. Co.,* 68 Mich App 514, 516; 242 NW2d 824 (1976); *McLaughlin v. Consumers Power Co.,* 52 Mich App 663, 666; 218 NW2d) 122 (1974). (emphasis added)

The thrust of defendants' second motion for summary judgment appears to be an argument that no genuine issue of fact remains simply because plaintiffs allege that defendants' publications gave rise to false implications, insinuations, imputations and portrayals and that, as a matter of law and fact, plaintiffs' claim cannot be sustained. Plaintiffs respectfully submit that defendants overlook the vast majority of defamation authorities which, having considered this question, clearly hold that a defamation action may be successfully maintained by plaintiffs alleging false implications, insinuations, imputations and portrayals.

A. False Implications, Insinuations, Imputations and Portrayals are as Capable of Being Defamatory as are Actual False Statements.

Despite defendants' inference that false implications, insinuations, imputations and portrayals are incapable of defamatory interpretation if contained in an article which is on its face true, virtually every court which has con-

sidered this issue has held that factually accurate words may be capable of defamatory interpretation.

Considering this same issue, the Supreme Court of Tennessee in *Memphis Publishing Co. v. Nichols,* 569 SW2d 412, 419-420 (Tenn 1978), in the context of a defamation action alleging that defendant newspaper's factual accurate report gave rise to an implication of an adulterous relationship, stated in pertinent part:

> Whether the news article published by the defendant newspaper concerning the shooting episode at the Nichols' home was, in fact, understood by readers in its defamatory sense is ultimately a question for the jury. But preliminary determination of whether the article is *capable* of being so understood is a question of law to be determined by the court. In our opinion, defendant-newspaper's motion for a directed verdict in this case must be resolved in favor of Mrs. Nichols. When read and construed in the sense in which the reader would ordinarily understand it, the clear implication of the article is that Mrs. Nichols and Mr. Newton had an adulterous relationship and were discovered by Mrs. Newton, thus precipitating the shooting incident. If so read, it can hardly be doubted that Mrs. Nichols' reputation would be injured.
>
> * * *
>
> In this case, the defendant newspaper does not assert that Mrs. Nichols and Mr. Newton in truth had an adulterous relationship. Nevertheless, the defendant's principal defense is that all material facts stated in the new article were substantially true, emphasizing in its brief:
>
> > 'IT IS OF CRUCIAL IMPORTANCE TO NOTE THAT THE RECORD REFLECTS THAT EVERY MATERIAL FACT IN THE ARTICLE QUOTED ABOVE WAS TRUE.
> >
> > * * *

> Mrs. Nichols *was in fact* treated at St. Joseph Hospital for a bullet wound in her arm after the shooting. A 40-year old woman *was in fact* held by police in connection with the shooting. A shot *was in fact* fired at the suspect's husband. The suspect *did in fact* find her husband at the Nichols' home with Mrs. Nichols. The suspect *did in fact* fire a shot at her husband and then at Mrs. Nichols and *did in fact* strike her in the arm. No charges *had in fact* been placed at the time of the writing of this article.'
>
> In our opinion, the defendant's reliance on the truth of the facts stated in the article in question is misplaced. The proper question is whether the *meaning* reasonably conveyed by the published words is defamatory, 'whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' *Fleckenstein v. Friedman,* 266 N.Y. 19, 23, 193 N.E. 537, 538 (1937). The publication of the complete facts could not conceivably have led the reader to conclude that Mrs. Nichols and Mr. Newton had an adulterous relationship. The published statement, therefore, so distorted the truth as to make the entire article false and defamatory. It is no defense whatever that individual statements within the article were literally true. Truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true. *See Brown v. First National Bank,* 193 N.W. 2d 547, 553 (Iowa 1972).

(citations generally omitted) (emphasis as in original).

Other jurisdictions have considered the question of defamation by implication, insinuation, imputation, and portrayal, and have adopted the same position as the authorities above. For example, in *Schaefer v. Lynch,* 406 So 2d 185, 188 (La 1981), the Louisiana Supreme Court stated in pertinent part:

> The article is defamatory in the sense that it tends to diminish the public's respect for [plaintiff]. A defamatory meaning is insinuated. When truthful statements carry a defamatory innuendo, the implication should also be true to justify publication. . . . *Madison v. Bolton, supra,* correctly held that truthful statements which carry a defamatory implication can be actionable.

(citations omitted). Similarly, the Massachusetts appellate courts have considered this issue time and again and have recognized liability "for what is insinuated as well as for what is stated expressly." *Mikhalik v. Duprey,* 417 NE 2d 1238, 1239 (Mass App 1981) (citing six additional cases in support). The Massachusetts Supreme Judicial Court has also recently reiterated that:

> The test of whether a publication is defamatory is whether, in the circumstances, the writing discredits the plaintiff "in the minds of any considerable and respectable segment in the community."

Tropeano v. Atlantic Monthly Co., 379 Mass 745, 400 NW 2d 847 (Mass 1980). A slightly different test has been used by California courts, namely, what is the probable effect of a publication upon the mind of the ordinary reader. *See, e.g., Howard v. Southern California Associated Newspapers,* 95 Cal App 2d 580, 213 P 2d 399 (1950), *overruled in part, on different grounds, Field Research Corp. v. Superior Court,* 77 Cal Rptr 243, 453 P 2d 747 (1969) (scope of California punitive damages statute); *Harris v. Curtis Publishing Co.,* 49 Cal App 2d 340, 121 P 2d 761 (1942).

Still other jurisdictions have also held that implications, insinuations, imputations and portrayals may be defamatory. In *Marion v. Davis,* 217 Ala 16, 18, 114 So

357, 359 (1927), the Alabama Supreme Court stated in part:

> It is not necessary to render words defamatory and actionable that they make defamatory charges in direct terms; they are equally actionable if the charge is made indirectly or by necessary inference, and it matters not how artful or disguised their meaning is concealed, if they are in fact defamatory.

The Iowa Supreme Court has observed in *Turner v. Brien,* 184 Iowa 320, 326, 167 NW 584, 586 (1918), that "it is the thought conveyed, not the words, that does the harm," while the Delaware Supreme Court has similarly noted, in *Rice v. Simmons,* 2 Harr (Del) 417, 433, 31 Am Dec 766 (1839), that:

> The character of a libel is to be judged of by the effect it produces on the mind, . . . and the attempt to show in what it consists may depend much on inferential reasoning.

Finally, as noted in the trial court on oral argument, the Fifth Circuit Court of Appeals' decision in *Caldwell v. Crowell-Collier Publishing Co.,* 161 F2d 333, 335-336 (CA 5), *cert. denied,* 332 US 766, 68 S Ct 74, 92 L Ed 51 (1947), is instructive. Construing a nationwide publication, the Fifth Circuit stated:

> A libel is a compound of written falsity and malicious publication, but *the falsity may consist in untrue imputation as well as a direct statement,* and malice may be inferred from the nature of the charges made. *False imputations may be actionable per se,* that is in themselves, *or per quod,* that is on allegation and proof of special damages.
>
> • • •
>
> It is not necessary that the false charges be made in a direct manner, if the words in their ordinary mean-

> ing convey it, and *an insinuation is as actionable as a positive assertion* if the meaning is plain. (emphasis added)

Accordingly, the Fifth Ciruit reversed the trial court's dismissal of plaintiff's suit based upon failure to state a claim. *See also Schultz v. Reader's Digest Ass'n,* 468 F Supp 551, 554 (ED Mich 1979) (it is for the jury to determine the way in which an article susceptible of both defamatory and non-defamatory interpretations is understood).

Other authorities reaching the same conclusion—that implications, insinuations, imputations and portrayals may be actionable—include Gatley, *Libel & Slander* (4th ed 1953), pps 18-21 ("A defendant is liable for insinuation as well as for explicit statement, for insinuation may be as defamatory as direct assertion and even more mischievous."); 33 Am Jur, Libel and Slander, §§5, 9, 45; Prosser, *Torts* (4th ed 1971), §111 ("In order that defendants' words be defamatory, they must be understood in a defamatory sense. . . . [T]here may be defamation by means of a question, an indirect insinuation, an expression of belief or opinion, or sarcasm or irony.") *See also Williams v. Hicks Printing Co.,* 159 Wisc 90, 150 NW 183, 188 (1914) ("conditional privilege . . . does not extend to unjust inferences. . . . "; *Zbyszko v. New York American, Inc.,* 228 App Div 277, 239 NYS 411 (1930) (defamation by implication actionable); *Duncan v. The Record Publishing Co.,* 145 SC 196, 143 SE 31 (1927) ("But it does not follow that such literal truth was a complete defense, as appellants contended. The plaintiff's cause of action for libel was predicated upon the charge that the publication, literally true as it was, was intended to convey and conveyed to readers thereof the defamatory meaning attributed thereto. . . ."); Spiegel,

Defamation by Implication—In the Confidential Manner, 29 So Cal L Rev 306 (1956).

B. Michigan Law Also Recognizes that False Implications, Insinuations, Imputations and Portrayals are Actionable as Defamatory.

Numerous Michigan decisions have recognized that false implications, insinuations, imputations and portrayals are actionable as defamatory. For example, the Michigan Supreme Court in *Nuyen v. Slater,* 372 Mich 654, 662; 127 NW 2d 369 (1964), stated:

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

Thus, while not directly discussing false implications, the Supreme Court clearly contemplates both express and implied defamation. Other Michigan decisions, including many cited by defendants themselves, support this conclusion. In *Kenney v. Hatfield,* 351 Mich 498, 512, 88 NW 2d 535 (1958), the Michigan Supreme Court acknowledged:

> It is generally held that a publication *imputing* impairment of mental faculties is libel per se, and we agree with plaintiff and appellant that the publication complained of here is such. (emphasis added).

Consideration of natural or logical implications, insinuations, and imputation is also recognized in *Hysko v. Polonia Publishing Co.,* 239 Mich 676, 681, 215 NW 3 (1927), where the Supreme Court stated, in a defamation context:

> The words used are to be taken in the sense in which they would be understood by those who read them.

As noted by defendants, the Michigan Supreme Court has often considered *the extent* of inference to be recognized

as libelous. *See, e.g., Van Lonkhuyzen v. Daily News Co.,* 195 Mich 283, 295, 161 NW 979 (1917); *Simons v. Burnham,* 102 Mich 189, 195-197 (1894). But these older cases, relied upon by defendants, against make clear that the scope of defamation includes liability for inferences; as stated by the Supreme Court in *Simons, supra:*

> We can understand how words may be used and understood in a different, and even opposite, sense from what they naturally and ordinarily import, as where used ironically, or in the nature of slang, or as a quotation having a well understood significance, or where they are used in a cipher; but in all such cases it is necessary that the declaration should allege facts which, if proved, will enable a court to say that these words, interpreted in the light of them, may reasonably be held to bear the construction claimed, *leaving to the jury* the truth or falsity of the allegations upon which the alleged meaning depends, as well as *the question of the meaning.*
>
> * * *
>
> We get into deep water when we depart from the rule that actions for slander and libel do not lie upon inferences, *though we must recognize a distinction between inferences which are the natural result of implications contained in the language of the publication . . . and inferences drawn only from the facts themselves. In the former case the action may lie,—not because of the inference, but by reason of the implication;* in the latter it will not. (emphasis added).

Thus, even under the Supreme Court's 1894 decision in *Simons,* plaintiffs herein are recognized to have a cause of action in defamation against defendants based upon the implications arising out of defendants' inferences. *See also Sanders v. Evening News Ass'n,* 313 Mich 334, 343, 21 NW 2d 152 (1946) (defendants' publications must

be "fairly and reasonably construed"); *Edwards v. Chandler,* 14 Mich 471, 476, 90 Am Dec 249 (1866) ("[W]e are not prepared to say that a jury could not draw such an inference without unreasonably stretching or perverting the sense. Such language must be construed by the jury, and not by the court."); *Dawson v. Wright,* 8 Med L Reptr 2001, 2002 (Oakland County Circuit Court No. 80-206224, decided April 30, 1982) ("the article is reasonably susceptible of a defamatory interpretation").

Thus, Michigan case law clearly supports the widely recognized principle that false implications, insinuations, imputations, and portrayals are actionable. *See also* MCLA 600.2911(1) (imputation of unchastity as defamatory).

C. The Trial Court's Finding was Supported By the Record Before It.

Contrary to defendant's misrepresentations, at no time have plaintiffs admitted that the articles in question are factually or otherwise true. At no time during this litigation has the trial court found plaintiffs to be either public figures or public officials (plaintiffs expressly deny that they are either public figures or public officials). At no time during this litigation has the trial court found defendants' articles regarding plaintiffs to be comment on a matter of public interest (plaintiffs deny that any matter regarding plaintiffs own lives is a matter of public interest). At no time during presentation of their motion for summary judgment pursuant to GCR 1963, 117.2(3), have defendants submitted a proper affidavit in support of that motion. During oral argument on defendants' second motion for summary judgment, defendants were

unable to cite any authority in support of their position. Defendants' second motion for summary judgment was actively opposed by plaintiffs, with proper and unrebutted supporting affidavits signed by plaintiffs specifying denying defendants' false implications, insinuations, imputations and portrayals. All law presented during oral argument on defendants' second motion for summary judgment supported plaintiffs' position.

In light of the above record—the same record before the trial court when it heard defendants' second motion for summary judgment—it is ludicrous for defendants to contend that the trial court's order denying defendants' motion was "clearly erroneous" as alleged in defendants' Application for Leave to Appeal to this Court. Plaintiffs respectfully submit that the trial court's finding of a factual issue—whether defendants' articles were capable of a defamatory interpretation—was not clearly erroneous. *By analogy, see Superior Prod v. Merucci Bros,* 107 Mich App 153, 309 NW 2d 188 (1981) (an appellate court will set aside a trial court's findings of fact only where the findings are clearly erroneous).

D. In the Absence of Any Trial Court Finding of Public Figure/Public Official/Public Interest Status With Regard to This Litigation, Defendants' Federal Constitutional Argument is Not Properly Before This Court, is Premature, and Confuses Defamation Concepts.

Defendants rely upon three cases in support of defendants' federal constitutional argument, *Gertz v. Robert Welch, Inc,* 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974) (Gertz I); *Wilson v. Scripps-Howard Broadcasting Co,* 642 F 2d 371 (CA 6), *cert granted,* 454 US 962, 102

S Ct 500, 70 L Ed 2d 377 (1981) (settled prior to oral argument, National Law Journal, June 21, 1982, p. 9); and *Orr v. Argus-Press,* 586 F 2d 1108 (CA 6, 1978), *cert. denied,* 440 US 960, 99 S Ct 1502, 59 L Ed 2d 773 (1979). Plaintiffs respectfully submit that defendants' federal constitutional argument is not properly before this Court, is premature, and confuses unnecessarily different defamation concepts.

In the trial court defendants' second motion for summary judgment briefly discussed the Sixth Circuit's implementation in *Wilson, supra,* of the United States Supreme Court's decision in *Gertz, supra.* In the trial court, *Gertz* was cited by defendants for the proposition that states may impose defamation liability upon a publisher or broadcaster so long as liability is not imposed without fault. Plaintiffs stand ready to prove that fault at trial, but are not required to prove fault on defendants' motion for summary judgment, only that a factual issue exists, which is the case unless defendants are admitting the falsity of their publications. It must be remembered that *Gertz* involved the reversal by the Supreme Court of the trial court's entry of judgment n.o.v., after full trial, and therefore presents a dissimilar test. The trial court's finding in this case did not impose liability without fault on defendants; rather, the trial court held only that a genuine issue of material fact had been presented.

With regard to defendant's reliance on *Wilson, supra,* plaintiffs again note that the appellate court's language must be viewed in the appropriate context—post-verdict, not on a motion for partial summary judgment before plaintiffs had opportunity to depose defendants. Again,

plaintiffs anticipate imposing liability based upon fault at trial in this case.

Considering defendants' reliance on *Orr, supra,* plaintiffs are compelled to note that *Orr* is another post-judgment appeal, not an interlocutory appeal. Further, reliance on *Orr* is misplaced and inappropriate as *Orr* specifically included a finding that plaintiff was a public figure and a finding of public interest, thereby requiring an actual malice standard inapplicable in this matter where no court has made any such finding on either issue.

Plaintiffs do not dispute that a different standard may apply post-judgment, after trial, but respectfully submit that defendants' premature application of post-trial standards in seeking to overturn a trial court finding that plaintiffs' unrebutted affidavits at a minimum created a genuine issue of material fact under GCR 1963, 117.2(3), is erroneous and unnecessarily confuses defamation concepts.

Plaintiffs also note for purposes of clarification that defendants' use of related jury instructions (3 Devitt & Blackmar, Federal Jury Practice and Instructions (3d ed), § 84.08) at pages 8-9 of defendants' Brief on Appeal is seriously misleading; even a cursory review of this material in the original clearly indicates the caption on the instruction: "Libel in *Privileged* Situation—Essential Elements" (emphasis added). As stated above, there has been no finding that this case involves (a) a public figure; (b) a public official; or (c) a matter of public interest. Absent such a supportable finding, no privileged situation exists, and defendants' misrepresentation (including a requirement "actual malice" under the sixth part of the

instruction) that this instruction is in any way applicable to this case must be disregarded by this Court.

SUMMARY

In the trial court defendants sought summary judgment based upon the alleged absence of a genuine issue of material fact. Several aspects of defendants' Brief on Appeal raise issues arising out of a 1981 trial court order denying defendants' motion for summary judgment for failure to state a claim upon which relief could be granted; these aspects and issues were not preserved for appeal and may not properly be considered by this Court as part of this appeal.

Further, defendants' second motion for summary judgment was defective in that it was not supported by a proper affidavit under GCR 1963, 117.3. This defect was raised in the trial court by plaintiffs, yet not cured by defendants. This Court has repeatedly held that summary judgment shall not be granted under such circumstances.

Finally, defendants allege that there can be no defamation based upon false implications, insinuations, imputations, and portrayals. As demonstrated by plaintiffs at length, numerous state and federal court decisions clearly indicate that false implications, insinuations, imputations, and portrayals clearly are actionable, particularly with a private individual and private matters such as in this case. Michigan decisions repeatedly have held that a defamation action may be maintained based upon false implications, insinuations, imputations, and portrayals. *See, e.g., Simons v. Burnham, supra.* No finding of applicable privilege, based on public figure/official or

public interest or otherwise, has been made by the trial court, and this issue is not before this Court on appeal. Further, case law is clear, contrary to defendants' implied assertion, that different standards of proof are to be used when determining a motion for summary judgment not supported by proper affidavits than when reviewing trial proofs in a post-judgment proceeding.

Plaintiffs respectfully submit that the trial court's decision in this matter was proper and must be affirmed.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully pray and ask this Honorable Court to affirm the trial court's May 6, 1982, order denying defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claim, together with costs and attorneys' fees to plaintiffs most unjustly sustained.

Respectfully submitted,

KITCH, SUHRHEINRICH, SMITH, SAURBIER & DRUTCHAS, P.C.

BY: STEPHEN M. KELLEY (P33197)
Attorneys for plaintiffs
2000 Buhl Building
Detroit, Michigan 48226
(313) 964-5890

Dated: January 26, 1983

STATE OF MICHIGAN
IN THE COURT OF APPEALS

Court of Appeals
No.: 64729

Wayne County Circuit
Court No.: 80-012145 CZ

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,

Plaintiffs-Appellees,

v

THE EVENING NEWS ASSOCIATION, INC., a Michigan Corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY, and JIM GRAHAM, jointly and severally,

Defendants-Appellants.

AFFIDAVIT OF COUNSEL

STATE OF MICHIGAN)
SS:
COUNTY OF WAYNE)

STEPHEN M. KELLEY, being first duly sworn, deposes and says that he is an attorney for plaintiffs in this matter, and that he has read the foregoing BRIEF ON APPEAL by him subscribed and says that the contents of same are true to the best of his knowledge, information and belief.

Deponent further sayeth not.

/s/ Stephen M. Kelley

Subscribed and sworn to before me
this 26th day of January, 1983.

/s/ Tracy Rae Anger
Notary Public
Wayne County, Michigan
My commission expires: 11/21/84

STATE OF MICHIGAN
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Defendants-Appellants.

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

AUDREY BRENNAN, being first duly sworn deposes and says that she is employed by the law firm of KITCH, SUHRHEINRICH, SMITH, SAURBRIER & DRUTCHAS, P.C., attorneys for Plaintiffs herein; that

on the 26th day of January, 1983, she did serve a true copy of PLAINTIFFS' BRIEF ON APPEAL, AFFIDAVIT OF COUNSEL, and AFFIDAVIT OF SERVICE, upon the following attorney of record:

JAMES E. STEWART
1881 FIRST NATIONAL BLDG.
DETROIT, MICHIGAN 48226

by enclosing same in an envelope addressed to same and depositing said envelope in the U.S. postal receptacle in the Buhl Building, Detroit, Michigan.

Deponent further saith not.

/s/ Audrey Brennan

Subscribed and sworn to before me
this 26th day of January, 1983.

/s/ Tracy Rae Anger
Notary Public
Wayne County, Michigan
My commission expires: 11/21/84